31 January 1978

STATINTL MEMORANDUM FOR: [redacted]
Office of General Counsel

STATINTL FROM : [redacted]
Position Management & Compensation Division

SUBJECT : Request for Interpretation of Agency Policy and Federal Regulations As They Apply to Overtime Entitlements of Two Office of Logistics Safehouse Keepers

REFERENCE : Memo from Director of Logistics to the Director of Personnel, dated 23 December 1977; subject: Safehouse Keepers and FLSA

1. Attached is a copy of reference in which the Office of Logistics requests an opinion on their legal responsibilities concerning the overtime entitlements of two safehouse keepers. In regard thereto, we have developed the following tentative comments, but would appreciate an Office of General Counsel review of both the Office of Logistics request and our comments:

(a) concerning the recommendation for annual premium pay in lieu of administratively uncontrollable overtime, federal pay regulations do not grant this form of premium pay for employees whose basic pay is adjusted from time to time by wageboard or similar authority in accordance with a prevailing rate. It therefore appears that subject employees should not be compensated by annual premium pay since (1) they are under the federal wage grade system and (2) Agency regulations make no provision for annual premium pay for such employees;

(b) likewise, federal pay regulations do not provide for the application of the fluctuating hours concept for hourly employees. This concept applies only to salaried employees whose salaries are fixed regardless of the number of hours worked. Since subject employees' contracts currently call for them to be paid an hourly rate for a specified number of hours per week, this precludes the application of the fluctuating hours concept in this case, including any FLSA overtime entitlements that could be derived therefrom.

2. Therefore, it appears that overtime work which is currently being performed by subject employees, whether authorized or "suffered or permitted", is payable under the provisions of FLSA and must be compensated at one and one-half times their regular rate of pay. Under Agency policy, employees who are non-exempt under FLSA may not be granted compensatory time in lieu of paid overtime.

3. In view of the above, the Office of Logistics may wish to consider amending the contracts for subject employees whereby their employment status would be converted from wage grade to "salaried" with the provision that they would receive a fixed salary at or above the minimum wage on a periodic basis regardless of the number of hours worked in an administrative workweek. Under the fluctuating workweek concept, the overtime pay requirement of the FLSA would be satisfied if the employees' overtime compensation for work in excess of 40 hours is computed at one-half times their regular rate of pay.

4. Whether the subject employees retain their wage grade status or are converted to "salaried" status, it would seem appropriate to amend their contracts to include the following provisions: (a) no overtime would be authorized nor "suffered or permitted" during periods in which the safehouse has no guests; (b) irregular or occasional overtime work performed in excess of 40 hours per week during periods in which the safehouse is occupied by guests would be "suffered or permitted" and, therefore, compensable under the FLSA; and provided that (c) such overtime work fell within a designated daily period of 16 hours during which subject employees would be responsible for accommodating the guests within the bounds of assigned duties, and as directed, or under circumstances recognized by them. No overtime would be authorized nor "suffered or permitted" for hours worked beyond this daily 16 hour period.

5. It is requested that the OGC review the above comments and the attached memorandum and provide us with an interpretation of Agency policy and federal regulations with respect to overtime entitlements of the two Office of Logistics safehouse keepers.

STATINTL

3920-77

23 DEC 1977

MEMORANDUM FOR: Director of Personnel

FROM: James H. McDonald
Director of Logistics

SUBJECT: Safehouse Keepers and FLSA (U/AIUO)

1. (U/AIUO) For some time the Office of Logistics (OL) has been working with the Position Management and Compensation Division, Office of Personnel (OP/PMCD), and the Office of General Counsel, trying to resolve a very difficult administrative problem involving two OL safehouse keepers and their entitlements under the Fair Labor Standards Act (FLSA). 25X1A

2. (C) On 29 September 1975, [redacted] entered into 2-year contracts with the Safehouse Section, Real Estate Branch, Real Estate and Construction Division, OL. The contracts provided for [redacted] to work 40 hours per week as custodian and for Mr [redacted] to work 30 hours per week as housekeeper for a safehouse in the local vicinity. For their services, they were provided meals and quarters in addition to weekly GS salaries. It has been brought to our attention that the method of remuneration may not have been in compliance with FLSA. 25X1A

3. (C) Mr. and [redacted] were paid as though they worked a regular schedule and were never compensated for overtime even though the requirements of both positions necessitated the incumbents to work irregular hours and cyclical schedules. The safehouse was occupied approximately 58 percent of the time between 29 September 1975 and 28 September 1977. When guests were in residence, [redacted] undoubtedly worked in excess of 40 hours per week. On the other hand, there were many weeks when the safehouse remained vacant and required a minimal amount of maintenance. They were never required to keep a log of the actual hours and days worked until October 1977, at which time they were provided new contracts. During the time the safehouse is occupied, the housekeeper is required to buy food, plan menus, cook, serve, and totally maintain the house, including making beds, cleaning, etc., for as many as [redacted] 25X1A 25X1A

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SUBJECT: Safehouse Keepers and FLSA (U/AIUO)

In many instances, this requires 14 hours of overtime for Saturdays and Sundays and some overtime the rest of the week. Since the [redacted] style is to work as a team, in that they find it easier to make beds together, shop together, etc., it has been impossible for us to control overtime or, for that matter, to easily determine how much overtime is actually necessary. Until we asked them to keep track of overtime last October, the [redacted] have never mentioned overtime nor have they requested it. We, on the other hand, are apparently bound by FLSA to reimburse in some way for overtime worked. At the suggestion of OP/PMCD, who recently reviewed this office, including the Safehouse Section of which the [redacted] are a part, we have converted them to wage board -- she as a regular full-time employee (WG-05/1 or $11,773 per annum); he as a part-time employee, 30 hours a week (WG-01/1 or $6521 per annum). They are receiving the above remuneration in addition to free room. Free meals are provided when the safehouse is occupied which is approximately 60 percent of the time. We have always felt the [redacted] have been amply paid for the services rendered, particularly since approximately 40 percent of the time their duties are almost nonexistent. When, however, faced with FLSA requirements strictly adhered to, i.e., paying them full time and a half for all overtime, we feel that they would be paid far in excess of what is justified in these circumstances.

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4. (C) With the assistance of [redacted] of your office, we received from the Civil Service Commission the attached which states in cases like this "...FLSA is satisfied if the employee's overtime compensation for work in excess of 40 hours is computed at 'one-half' times his regular rate of pay." While paying one half their regular rate of pay would reduce considerably the amount paid for overtime, we prefer an alternative method of compensation and that is 10 percent premium pay in lieu of overtime. In our opinion their overtime is unscheduled and uncontrolled since we cannot anticipate in advance requirements for the safehouse nor, once occupants are in the safehouse, are we able to control in any way the amount of necessary overtime that must be provided by the [redacted] In allowing the second option of premium pay rather than overtime pay, we feel the Government would greatly benefit since rough calculations show that 10 percent of their salary would be less than overtime if paid at the rate of one half times their regular pay for 60 percent occupancy of the safehouse for the calendar year. Additionally, the Agency would benefit from all the time saved this Office and the Office of Finance in keeping track of and processing biweekly the continuing overtime reports.

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Reviewed by S 1/12/77

FILE CODE NUMBER

551-4-5

STATOTHR

PAY AND LEAVE ADMINISTRATION SECTION

STATINTL

NAME [redacted] TELEPHONE NUMBER [redacted]

ORGANIZATION
CIA

SUBJECT: Employee's Residing on Employer's Premises - What are hours worked?

NATURE OF INQUIRY Cooks and custodians live on the premises and perform housekeeping functions for live-in students. They work irregular hours and the requirement to work is cyclical depending on whether students are currently living in or not. Sometimes they perform over 40 hours work in a specific workweek. They are paid equivalent GS salaries and are furnished meals and quarters. Question: How to pay these employees in compliance with the FLSA?

ACTION
An employee who resides on the employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. If the employee is provided time for eating, sleeping, entertaining, and other periods of complete freedom from all duties during which he may leave the premises for purposes of his own, any reasonable agreement between the employer and the employee which takes into consideration all of the pertinent facts will be accepted. 1/
The employee must be paid at least the minimum wage rate for all hours actually worked and he must be paid at one and one-half times his regular rate of pay for all work in excess of 40 hours in a workweek. 2/ If, as in this case, the agreement provides for a weekly salary (biweekly or other periodic salary) regardless of the number of hours worked, the overtime pay requirement of the FLSA is satisfied if the employee's overtime compensation for work in excess of 40 hours is computed at "one-half" times his regular rate of pay. (floating workweek concept)

PERTINENT REFERENCES

29 C?F.R. 785.23
29 C.F.R. 778.114
Skelly Oil Co. v. Jackson, 148 P.2d. 182 (Okla Sup Ct) -copy attached.

See reverse side for footnotes

DATE CLOSED
Dec 7, 1976

STATINTL

[redacted]

DATE Dec 7, 1976

5. (U/AIUO) We would much appreciate your opinion on OL's legal responsibilities in these cases and especially the two options discussed in paragraph 4 above. If more information is necessary, please contact [redacted] Personnel and Training Staff, OL, on extension [redacted]

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[redacted]

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Att

CONFIDENTIAL

1/ When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. Walling v. A.H. Belo Corporation, 316 U.S.624, cited in Skelly Oil Co v. Jackson.

2/ An employee may not enter into agreement as to the computation of hours (worked) which operates to waive compensation for overtime actually worked. Skelly Oil Co. v. Jackson.